

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

LORRAINE THORP,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-T-0038
RICHARD THORP,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 06 DR 454.

Judgment: Affirmed.

Kara A. Stanford, Blair & Latell Co., L.P.A., 724 Youngstown Road, Niles, OH 44446 (For Plaintiff-Appellee).

Robert A. Henkin, 905 Bank One Building, 6 Federal Plaza Central, Youngstown, OH 44503 (For Defendant-Appellant).

DIANE V. GRENDALL, J.

{¶1} Defendant-appellant, Richard Thorp, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, granting him and plaintiff-appellee, Lorraine Thorp, a divorce and dividing the marital estate. For the following reasons, we affirm the decision of the court below.

{¶2} Richard and Lorraine were married on July 17, 1989. One child was born as issue of the marriage, Douglas Thorp, born on July 18, 1992.

{¶3} On November 1, 2006, Lorraine filed a Complaint for Divorce with Restraining Order in the Trumbull County Court of Common Pleas, Domestic Relations Division.

{¶4} On November 27, 2006, Richard filed an Answer and Counterclaim for Divorce.

{¶5} On April 10, 2007, the parties filed an Agreed Judgment Entry, which contained, inter alia, the following provision:

{¶6} It is further ORDERED, ADJUDGED AND DECREED that in lieu of spousal support and child support, the Defendant, Richard Thorp, will pay the mortgage indebtedness of the marital residence and all utility bills associated with the marital residence. In addition, the Defendant shall pay the Plaintiff Three Hundred Dollars (\$300.00) per week directly to the Plaintiff. The parties acknowledge that Fifty Dollars (\$50.00) of that amount is money for the child's allowance, child's spending money, and the child's school lunches.

{¶7} On August 2, 2007, Richard filed a Motion to Modify Temporary Orders, including the temporary order for child/spousal support. As grounds for the Motion, Richard stated that "he has suffered a significant loss of income that prevents him from satisfying the prior orders." A hearing on the Motion was scheduled for October 2, 2007, but was not held.

{¶8} On January 30, 2008, Richard filed a Notice of Bankruptcy Filing, advising the domestic relations court that he had filed for bankruptcy and that, pursuant to federal law, the matter is stayed.¹

1. According to documents submitted at the final trial on the divorce, Richard filed for bankruptcy on September 17, 2007. Lorraine claims the hearing on Richard's Motion to Modify Temporary Orders was not held due to the filing of the Bankruptcy Petition in September 2007. Nothing in the domestic relations court's docket confirms or contradicts this claim.

{¶9} On December 8, 2008, Richard filed a Motion to Reactivate Cause and Return to Regular Docket, advising the domestic relations court that his Chapter 13 Bankruptcy was finalized and the automatic stay terminated.

{¶10} On December 20, 2009, trial on the merits was held. At the conclusion of trial, the domestic relations court granted the parties a divorce, noting that a “supplemental entry” would be entered later, “resolving all disputed issues.”

{¶11} On February 12, 2010, the domestic relations court entered a Supplemental Judgment Entry (Final Decree of Divorce). Therein, the court made the following Findings of Fact:

{¶12} 3. The parties entered into certain stipulations which the Court finds to be fair and equitable to both parties and in the best interest of their minor child.

{¶13} The stipulations are as follows:

{¶14} Mother is the residential parent and legal custodian of Douglas. Father shall enjoy frequent and liberal companionship with the child.

{¶15} The former marital residence has been lost in a foreclosure proceeding and no further accounting for same is required.

{¶16} There are no pension assets to divide. No further accounting for same is required.

{¶17} The furniture and personal property of the parties have been mutually divided to their satisfaction. No further accounting for same is required.

{¶18} 4. The Court finds that Husband throughout most of the marriage has been involved in the excavating business. Wife has also been involved in this business throughout most of its operation, primarily as a bookkeeper. Testimony indicates that the business has been in Wife’s name, but was operated and controlled by Husband, until Husband went to prison, “for drugs and conspiracy,” in 2001. While Husband was in prison his son operated the business and Wife was an employee of the business. Upon Husband’s release from prison he began a new landscaping business known as Green Thumb Landscaping. The Green Thumb business is solely in Husband’s name. Wife has no part hereof. Significant tax debt results from the operation of the excavation business. The Court finds that Wife has no liability on any tax debt generated while Husband was in prison.

{¶19} 5. The Court finds that the Green Thumb Landscaping business is the full responsibility of Husband and any tax debt owed or created thereon is his responsibility and that Wife has no obligation for same.

{¶20} 6. The Court finds that the parties entered into an agreed entry setting forth temporary support orders on April 10th, 2007. Pursuant to that Order Husband was to pay the mortgage indebtedness on the marital real estate and all utility bills associated with it. In addition, he was to pay Wife \$300 per week. The Court finds that Husband paid according to this Order for a few months following its issue then stopped paying the mortgage and utility payments, while continuing to pay the \$300 a week support to Wife. The real estate was eventually lost in foreclosure, and as the parties stipulated, no further accounting for same is required. The Court finds that in August of 2007 Husband's then-counsel filed a motion to modify his support order but the matter was never scheduled for hearing and was never heard. The court finds that Husband stopped paying Wife the \$300 per week in February 2008. Consequently, the Court finds that an arrearage exists, for the time frame of 2/1/08 through 1/31/2010 in the amount of \$31,200, which shall be preserved and satisfied. The Court finds that this arrearage is intended to be in the nature of support and is not dischargeable in bankruptcy.

{¶21} ***

{¶22} 11. The existence and value of some business equipment listed by Husband in his Bankruptcy Petition *** remains in dispute. The Court finds that all of said equipment, except the miscellaneous hand tools valued at \$10,000, have been repossessed or scrapped, and further accounting for same is required. Husband shall retain all these miscellaneous hand tools and owed Wife \$5,000 as her one-half interest in these marital items.

{¶23} On March 11, 2010, Richard filed his Notice of Appeal. On appeal, he raises the following assignments of error:

{¶24} “[1.] The trial court erred when it ruled that ‘Husband shall retain all these miscellaneous hand tools and owes Wife \$5,000 as her one-half interest in these marital items.’”

{¶25} “[2.] Appellant Richard Thorp's rights were violated when the trial court never held a hearing on Thorp's motion to modify the court's temporary support order.”

{¶26} “[3.] The trial court erred and abused its discretion when it failed to credit Richard Thorp for specific monetary payments he had made to Lorraine Thorp.”²

{¶27} “In divorce proceedings, *** the court shall divide the marital and separate property equitably between the spouses.” R.C. 3105.171(B). “A trial court has broad discretion in making divisions of property in domestic cases.” *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. “A trial court’s decision will be upheld absent an abuse of discretion.” *Id.*, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131.

{¶28} “A trial court’s characterization of property as either marital or separate that involves factual questions is reviewed under a manifest weight of the evidence standard.” *Sweet v. Sweet*, 11th Dist. Nos. 2007-A-0003 and 2008-A-0003, 2009-Ohio-1924, at ¶48 (citation omitted). A trial court’s factual findings are entitled to a presumption of correctness and will not be reversed as being against the manifest weight of the evidence if they are supported by competent, credible evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, at syllabus.

{¶29} “Marital property” is defined to encompass “[a]ll real and personal property that currently is owned by either or both of the spouses,” and “[a]ll interest that either or both of the spouses currently has in any real or personal property.” R.C. 3105.171(A)(3)(a)(i) and (ii). “[P]roperty acquired during the marriage is presumed to be

2. Three additional assignments of error were raised in Richard’s appellate brief, challenging the domestic relations court’s judgment with respect to tax liabilities associated with Green Thumb Excavating & Landscaping. At oral argument, Richard’s counsel orally withdrew these assignments of error and disclaimed the alleged errors raised therein.

marital in nature unless it can be shown to be separate.” *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 160.

{¶30} “Separate property” is defined, in part, as “[a]n inheritance by one spouse by bequest, devise, or descent during the course of the marriage,” and “[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage.” R.C. 3105.171(A)(6)(a)(i) and (ii). “A party claiming separate property is burdened to prove the independent nature of the property by a preponderance of the evidence.” *Brady v. Brady*, 11th Dist. No. 2007-P-0059, 2008-Ohio-1657, at ¶18 (citation omitted); *Letson v. Letson*, 11th Dist. No. 95-T-5356, 1997 Ohio App. LEXIS 4445, at *6.

{¶31} In his first assignment of error, Richard asserts the domestic relations court erred in finding the “miscellaneous hand tools,” identified in his Bankruptcy Petition as “equipment *** used in business,” to be marital property and awarding Lorraine half of their value of \$10,000. Richard asserts that this finding contradicts the court’s other finding that “[t]he Green Thumb business is solely in Husband’s name,” and the “Wife has no part hereof.”

{¶32} According to the testimony adduced at trial, Richard began the Green Thumb business as a sole proprietor LLC sometime after his release from prison in 2003. Lorraine made a claim upon the tools as marital property, but not the business. Richard presented no evidence or argument that the tools were his separate property, as defined in R.C. 3105.171(A)(6). Rather, Richard’s argument rests upon the alleged contradiction in the domestic relations court’s determination that the business was his separate property, while the tools were marital property. There was no evidence

adduced at trial that the business possessed assets or value beyond the miscellaneous hand tools.

{¶33} Given the record before this court, we find no error in the domestic relations court's decision to award Lorraine half of the value of the miscellaneous hand tools used in the Green Thumb business. The evidence is that these tools were owned by one of the spouses during the course of the marriage. There is no evidence that these tools meet any of the definitions for "separate property" set forth in R.C. 3105.171(A)(6). Green Thumb Excavating was created during the course of the marriage and, arguably, could be considered marital property. Any error in the court's determination that the business constitutes Richard's separate property, however, is harmless inasmuch as there is no evidence of the business' value apart from the tools. Cf. *Johnson v. Johnson*, 5th Dist. No. 05-CA-49, 2006-Ohio-5901, at ¶¶71-76 (the court could not consider the value of an asset where there was no evidence thereof).

{¶34} The first assignment of error is without merit.

{¶35} In the second assignment of error, Richard argues the domestic relations court erred by not holding a hearing within twenty-eight days of his Motion to Modify Temporary Orders.

{¶36} "The right of a wife to temporary alimony," now known as spousal support, "rests largely in the discretion of the court." *Norton v. Norton* (1924), 111 Ohio St. 262, 269. "Upon request, in writing, after any temporary spousal support [order] is journalized, the court shall grant the party so requesting an oral hearing within twenty-eight days to modify the temporary order." Civ.R. 75(N)(2). Accordingly, "the court shall grant the party so requesting an oral hearing within twenty-eight days to modify the

temporary order.” *DeChristefero v. DeChristefero*, 11th Dist. No. 2001-T-0055, 2003-Ohio-3065, at ¶38.³

{¶37} In the present case, the parties filed an Agreed Judgment Entry on April 10, 2007, providing for spousal and child support to be paid to Lorraine in the amount of \$300 per week. On August 2, 2007, Richard filed a Motion to Modify Temporary Orders for the reason that he had suffered “a significant loss of income.” The matter was set for hearing before a magistrate on October 2, 2007⁴, but the hearing was never held and was not rescheduled.

{¶38} Lorraine asserts that the “sole reason” for the hearing not being held was Richard’s filing for bankruptcy in September 2007. The record before this court, however, is silent as to the reason the October 2, 2007 hearing was not held. Contrary to Lorraine’s assertion, the filing of the Bankruptcy Petition would not have stayed the divorce case with respect to temporary spousal and child support. The Bankruptcy Code expressly provides that “[t]he filing of a petition *** does not operate as a stay *** of the commencement or continuation of a civil action or proceeding *** for the establishment or modification of an order for domestic support obligations.” Section 362(b)(2)(A)(ii), Title 11, U.S.Code; *State ex rel. Miley v. Parrott*, 77 Ohio St.3d 64, 66, 1996-Ohio-350 (“although the filing of a bankruptcy petition stays the equitable distribution in a divorce case of the debtor’s interest in marital assets, certain aspects of the divorce case, such as dissolution of the marriage and child custody issues, are not

3. This provision of the Civil Rules has been interpreted by other courts to mean that a party has twenty-eight days from the entry of spousal support order to request modification. See *Kahn v. Kahn* (1987), 42 Ohio App.3d 61, 68; *Davis v. Davis* (1983), 12 Ohio App.3d 38, 39.

4. The Final Decree of Divorce states, however, that “the matter was never scheduled.”

stayed”). Thus, the filing of the Bankruptcy Petition in September 2007 did not excuse the court’s failure to hold a hearing on Richard’s Motion to Modify.

{¶39} While the domestic relations court failed to conduct a hearing within twenty-eight days of Richard’s Motion to Modify, this failure does not constitute a reversible error. It is incumbent upon Richard to demonstrate that he was prejudiced by the failure of the court to hold a hearing. *DeChristefero*, 2003-Ohio-3065, at ¶40. When a party is able to fully litigate the issues regarding temporary support orders during the final divorce trial, the trial may constitute the Civ.R. 75(N)(2) hearing on temporary support orders. *Doody v. Doody*, 11th Dist. No. 2006-L-200, 2007-Ohio-2567, at ¶44 (citation omitted).

{¶40} Richard argues the failure to hold a hearing was “very prejudicial,” in that “the best time to address issues of support was in the trial court, not this court of appeals.” However, Richard was not prevented from litigating the issue of temporary support at the trial on the merits of the divorce. The issue was raised during the testimony of both parties and addressed in the domestic relations court’s Judgment Entry.

{¶41} Lorraine testified that Richard ceased paying her the \$300 a week after she began working in February 2008.

{¶42} Richard testified as follows regarding the temporary support order:

{¶43} Attorney: In August of '07 did you ask *** the attorney who’s representing you [at that time] to file a motion to reduce your support order?

{¶44} Richard: Yes, he did.

{¶45} Attorney: And to the best of your knowledge, did he, in fact, file a motion or file something with the Court?

{¶46} Richard: He filed, yes.

{¶47} Attorney: What happened?

{¶48} Richard: I honestly don't know because I ended up letting him go and hiring you.

{¶49} ***

{¶50} Attorney: Did you discuss with your wife some 18 months ago that you were having financial problems?

{¶51} Richard: Yes.

{¶52} Attorney: And that that was making it difficult if not impossible to continue to pay.

{¶53} Richard: Yes.

{¶54} At trial, the tax records (Schedule C Profit or Loss from Business) reporting the income from Green Thumb Excavating for the years 2005, 2006, and 2007, were introduced. In 2007, the year in which Richard filed his Motion to Modify, Green Thumb earned a net profit of \$35,708, more than it had earned in the years 2005 or 2006.

{¶55} Based on this testimony, the domestic relations court determined that Richard owed an arrearage for his support obligation in the amount of \$31,200, for the period from February 2008 through January 2010. There is no reason why Richard could not have introduced evidence of the alleged financial hardship in 2007 that deprived him of the ability to pay the support order. Temporary support orders may be modified retroactively to the date on which a motion to modify was filed. *Doody*, 2007-Ohio-2567, at ¶44 (citation omitted); *Ostmann v. Ostmann*, 168 Ohio App.3d 59, 2006-Ohio-3617, at ¶45, fn. 11. While, for reasons unknown, the court did not comply with

Civ.R. 75(N)(2) by holding a hearing, Richard did nothing to ameliorate the situation by pursuing the matter over the next two years or by presenting evidence of his financial difficulties when able to do so at trial. Given these circumstances, the court's failure to hold a hearing on the temporary order was a harmless error and did not constitute an abuse of discretion.

{¶56} The second assignment of error is without merit.

{¶57} In the third assignment of error, Richard argues the domestic relations court erred by failing to credit him for certain support payments.

{¶58} “Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris*, 54 Ohio St.2d 279, at the syllabus.

{¶59} At trial, Richard testified that, throughout 2008 and 2009, he had contributed to Douglas' support by giving him lunch and spending money and by buying him school clothes. Richard further testified that, on two occasions, he gave Lorraine \$300 in cash for Douglas' support. Lorraine acknowledged that Richard gives Douglas money directly but denied receiving any support from him after the payments stopped in January 2008.

{¶60} There was no error in the domestic relations court's consideration of this testimony. With respect to the money given to Douglas, the court could not credit Richard because the amount given was undetermined. *Taylor v. Taylor*, 8th Dist. No. 86331, 2006-Ohio-1925, at ¶40. With respect to the alleged \$300 payments to Lorraine, the court, as the finder of fact, was free to believe Lorraine's testimony rather

than Richard's testimony. *Davis v. Flickinger*, 77 Ohio St.3d 415, 419, 1997-Ohio-260 ("a difference of opinion on credibility of witnesses and evidence" is not a legitimate ground for reversal).

{¶61} The third assignment of error is without merit.

{¶62} For the foregoing reasons, the decision of Trumbull County Court of Common Pleas, Domestic Relations Division, granting the parties a divorce and dividing the marital estate, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.